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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

AMERADA HESS CORPORATION and
L. A. STRICKLIN,
Petitioners,

v.

DAVID R. GREEN,
Respondent.

APPENDICES TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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APPENDIX A

**DAVID R. GREEN,
Plaintiff-Appellant,**

v.

**AMERADA HESS CORPORATION and
L. A. STRICKLIN, Defendants-Appellees.**

No. 82-4223

**United States Court of Appeals,
Fifth Circuit**

June 16, 1983.

Former employee brought action against former employee and former employer's vice-president, alleging wrongful discharge. The suit was originally brought in state court and removed to federal district court. The United States District Court for the Southern District of Mississippi, Dan M. Russell, J., denied employee's motion to remand, dismissed the cause against vice-president, and granted summary judgment in favor of former employer,

and employee appealed. The Court of Appeals, Clark, Chief Judge, held that there was a possibility that Mississippi court would conclude that former employee had set forth a valid cause of action for mental suffering against former employer's vice-president, who was a Mississippi resident, and there was a possibility that Mississippi court would conclude that employee's suit against vice-president was not barred, under res judicata and collateral estoppel principles, as a result of district court's judgment in favor of employer in employee's prior wrongful discharge suit; therefore, the vice-president was not fraudulently joined, and, because his presence destroyed diversity, cause would be remanded to state court.

Reversed and remanded with instructions.

1. Removal of Cases - 107(4)

In ruling on a motion for removal based upon fraudulent joinder, district court need not and should not conduct a full-scale evidentiary hearing on questions of fact affecting the ultimate issue of substantive liability in order to make the preliminary determination as to the existence of subject-matter jurisdiction. 28 U.S.C.A. § 1441.

2. Removal of Cases - 107(4)

In ruling on motion for removal based on fraudulent joinder, trial court erred in holding a full evidentiary hearing. 28 U.S.C.A. § 1441.

3. Removal of Cases - 107(7)

Burden of proving fraudulent joinder in support of a petition for removal is a heavy one, and removing party must prove that there is absolutely no possibility that plaintiff will be able to establish a cause of action

against the in-state defendant in state court, or that there has been outright fraud in plaintiff's pleadings of jurisdictional facts. 28 U.S.C.A. § 1441.

4. Federal Courts - 420

Removal of Cases - 107(7)

In making its determination on an allegation of fraudulent joinder, district court must ordinarily evaluate all of the factual allegations in plaintiff's state court pleadings in the light most favorable to plaintiff, resolving all contested issues of substantive fact in favor of plaintiff; however, that is not the case when plaintiff is collaterally estopped from contesting a given issue or fact, and in making that determination, federal court should apply federal law. 28 U.S.C.A. § 1441.

5. Judgment - 634

Under federal law, the three traditional requirements for the application of the doctrine of collateral estoppel are: the issue to be precluded must be identical to that involved in the prior action; in prior action, the issue must have been actually litigated; and the determination made of the issue in the prior action must have been necessary to the resulting judgment.

6. Removal of Cases - 102

If there is even a possibility that a state court would find a cause of action stated against any of the named in-state defendants on the facts alleged by plaintiff, then federal court must find that the in-state defendants have been properly joined, that there is incomplete diversity, and that the case must be remanded to state courts; there must be no possibility of a valid state

cause of action being set forth against in-state defendant before court may hold that there has been a fraudulent joinder. 28 U.S.C.A. § 1441.

7. Federal Courts - 420

In virtually all cases in which federal court must decide the res judicata effect of a prior judgment of a federal court, it must apply federal res judicata principles; but that is not true where the court is evaluating the merits of a fraudulent joinder claim. 28 U.S.C.A. § 1441.

8. Judgment - 634

In order for the doctrine of res judicata to apply under Mississippi law, four identities must exist: identity of the thing sued for; identity of the cause of action; identity of the persons and parties to the action; and identity of the quality in the persons for and against whom the claim is made.

9. Judgment - 720

Collateral estoppel only applies when the issues were actually litigated in prior action.

10. Removal of Cases - 102

There was a possibility that Mississippi court would conclude that former employee, who alleged wrongful discharge, had set forth a valid cause of action for mental suffering against former employer's vice-president, who was a Mississippi resident, and there as a possibility that Mississippi court would conclude that employee's suit against vice-president was not barred, under res judicata and collateral estoppel principles, as a result of district court's judgment in favor of employer in employee's prior wrongful discharge suit; therefore, the vice-president was not fraudulently joined, and because his presence destroyed diversity, cause would be remanded to state court.

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Appeal from the United States
District Court for the Southern District
of Mississippi.

Before CLARK, Chief Judge, THORNBERRY
and RANDALL, Circuit Judges.

CLARK, Chief Judge:

David R. Green claims he was wrong-
fully discharged by his employer,
Amerada Hess Corporation. Green also
claims that L. A. Stricklin, a vice-
president of Amerada Hess, had a part in
his discharge. Green brought an action
against Amerada Hess and Stricklin in a
Mississippi court. Amerada Hess removed

the action to federal court. Green moved the court to remand the action to state court. The court denied the motion, dismissed the cause against Stricklin, and granted summary judgment in favor of Amerada Hess. We hold that Green's motion to remand should have been granted, and reverse and remand with instructions that the case be returned to state court.

Green sustained a back injury in the course of performing his employment duties for Amerada Hess. Green eventually required surgery. He recuperated from the operation and resumed his employment. He was fired within one year.

Green brought an action against Amerada Hess in federal court. The basis of jurisdiction was diversity of citizenship. Green alleged that he had been discharged in retaliation for

pursuing his rights under Mississippi's workmen's compensation statute.^{1/}

The district court granted summary judgment in favor of Amerada Hess. On appeal, Green v. Amerada Hess, 612 F.2d 212 (5th Cir.), cert. denied, 449 U.S. 952, 101 S.Ct. 356, 66 L.Ed. 2d 216 (1980) (Green I), this court affirmed. We first noted that Green "did not have a written contract of employment, but was hired for an indefinite period of time." Id. at 213. After examining the conflicting caselaw of other jurisdictions, and pointing out that neither the Mississippi legislature nor the Mississippi courts had addressed the matter, the

^{1/} Green's right to temporary total disability compensation, temporary partial disability compensation, and permanent partial disability compensation was established by an award of the Mississippi Workmen's Compensation Commission. Green v. Amerada Hess Corp., M.W.C.C. No. 74 10431-8-4675.

court refused to create a new cause of action for retaliatory discharge under Mississippi law. The court went on to hold that an employer under Mississippi law has the legal right to discharge an employee hired for an indefinite term without any justification. Id. at 214. The court affirmed the district court's ruling that Green had failed to state a cognizable claim.

Green remained undaunted. He filed suit in Mississippi state court alleging wrongful discharge and a variety of other claims. Green named L. A. Stricklin, and Amerada Hess as defendants. Both Stricklin and Green are Mississippi residents. Amerada Hess removed the action to federal court. It contended that Green fraudulently joined Stricklin in the action in order to destroy diversity jurisdiction. Green promptly moved

the court to remand the case back to state court.

The court held a full evidentiary hearing at which live testimony, deposition transcripts, and documentary evidence were produced. The court denied Green's motion to remand. On the basis of "the strong evidence presented by Defendants and the somewhat transparent support mustered by Plaintiff," the court concluded that Stricklin was fraudulently joined. It also sua sponte dismissed Strickling from the lawsuit pursuant to Fed.R.Civ.P. 12(b)(6).

Amerada Hess moved for summary judgment. The court held another hearing, and then granted the motion. It ruled that Green's action was barred, under federal principles of res judicata and collateral estoppel, by this court's prior decision in Green v. Amerada Hess, 612 F.2d 212 (5th Cir. 1980). The court

entered final judgment and Green appeals.

In analyzing the issues presented on this appeal, we are guided by B., Inc. v. Miller Brewing Company, 663 F.2d 545 (5th Cir. 1981). In that case, the court was called upon to review the standards and procedures which are to be applied when a fraudulent joinder has been alleged. B., Inc. brought suit against Miller Brewing Company, a Wisconsin company, in Texas state court. He also named four Texas residents as defendants. Miller of Wisconsin removed to federal court. It alleged that B., Inc. fraudulently joined the Texas defendants in order to defeat diversity jurisdiction. B., Inc. moved to have the case remanded. The district court held an evidentiary hearing which lasted several days. It concluded that the Texas defendants had been fraudulently

joined, and dismissed all four of them from the action.

This court reversed the judgment of the district court. We repeatedly emphasized that "district courts must not 'pretry' substantive factual issues in order to answer the discrete threshold question of whether the joinder of an in-state defendant is fraudulent." Id. at 546. The only issue that the court should address is that of its own jurisdiction.

[1] As a procedural matter, a district court

need not and should not conduct a full scale evidentiary hearing on questions of fact affecting the ultimate issues of substantive liability in a case in order to make a preliminary determination as to the existence of subject matter jurisdiction. The question of whether the plaintiff has set forth a valid claim against the in-state defendant(s) should be capable of summary determination.

Id. at 551. Although this general command is subject to limited exceptions,^{2/} none of them are applicable here.

[2] Despite this clear mandate, the district court in the instant case held an extensive evidentiary hearing. The factual issues it addressed related to matters of substance, not jurisdiction, in direct contravention of B., Inc. It examined at length Stricklin's role in the decision to terminate Green, and found "a plethora of facts which could have been ascertained by Plaintiff to

^{2/} For example, if Amerada Hess or Stricklin contended that Green's pleadings contained misrepresentations of jurisdictional fact, an evidentiary hearing would have been appropriate. Id. at 551 n. 14. But here, they do not dispute that Stricklin and Green are Mississippi residents.

verify Stricklin's lack of personal involvement."3/

The district court relied in part on Smith v. City of Jackson, 358 F.2d 705 (5th Cir. 1966), in its decision to conduct a full evidentiary hearing on the motion to remand. Smith, however, was a criminal trespass case removed to

3/ Although Stricklin acknowledged that he had been informed of the decision to terminate Green prior to its exception, the court found that he exercised no authority to approve or deny that decision. The court rejected Green's evidence to the effect that Stricklin was instrumental in the mistreatment of Green. For example, it discredited the testimony of an Amerada Hess employee that Stricklin had made the termination decision.

federal court under 28 U.S.C. § 1443.4/
The concerns in Smith were much like the
concerns in Georgia v. Rachel, 384 U.S.
780, 86 S.Ct. 1783, 16 L.Ed.2d 925
(1966). The defendants in Rachel also
petitioned for removal pursuant to sec-
tion 1443. The Supreme Court held that
the goals of the Civil Rights statutes,

4/ 28 U.S.C. § 1443 provides:

Any of the following civil actions
or criminal prosecutions, commenced
in a State court may be removed by
the defendant to the district court
of the United States for the
district and division embracing the
place wherein it is pending:

- (1) Against any person who is
denied or cannot enforce in
the courts of such State a
right under any law providing
for the equal civil rights of
citizens of the United States,
or of all persons within the
jurisdiction thereof;
- (2) For any act under color of
authority derived from any law
providing for equal rights, or
for refusing to do any act on
the ground that it would be
inconsistent with such law.

protecting the rights of the defendants to peacefully attempt to be served upon an equal basis in public restaurants, precluded the State from prosecuting these defendants in state courts, and that under section 1443, remand to the state court was improper. Rachel and Smith did not involve fraudulent joinder, but rather, claims of prejudicial prosecution in the state courts. Such considerations are not found in the present case. Removal in this case is sought under the general removal statute, § 1441, not the civil rights removal statute, § 1443. Therefore, the rule set forth in Smith does not apply.

We thus conclude that the district court erred in holding a full evidentiary hearing. We must now determine whether that error was harmless. If, in viewing the facts in their proper light and in applying the proper standard, it can be

said that Stricklin was indeed fraudulently joined, the district court's ruling may be affirmed consistent with substantial justice, despite its procedural error. See Fed.R.Civ.P.61.5/

[3] The burden of proving a fraudulent joinder is a heavy one. The removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state

5/ Rule 61 provides:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every state of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

defendant in state court, or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts. B. Inc. at 549; Bobby Jones Garden Apartments v. Suleski, 391 F.2d 172, 177 (5th Cir. 1968); Parks v. New York Times Company, 308 F.2d 474, 478 (5th Cir. 1962), cert. denied, 376 U.S. 949, 84 S.Ct. 964, 11 L.Ed.2d 969 (1964).

Because the parties have admitted that Green and Stricklin are Mississippi residents, Green's pleadings of jurisdictional facts are obviously not fraudulent. Our sole concern is whether there is a possibility that Green has set forth a valid cause of action.

[4,5] In making its determination, the court must ordinarily evaluate all of the factual allegations in the plaintiff's state court pleadings in the light most favorable to the plaintiff, resolving all contested issues of

substantive fact in favor of the plaintiff. B., Inc. at 549. This case presents unique circumstances that justify a limited exception to this requirement. Although the court must normally assume all the facts as set forth by the plaintiff to be true, this is not the case when the plaintiff is collaterally estopped from contesting a given fact or issue. In making this determination, the federal court should apply federal law. Cf. Stovall v. Price Waterhouse Co., 652 F.2d 537, 540 (5th Cir. 1981); Cemer v. Marathon Oil Co., 583 F.2d 830, 831 (6th Cir. 1978). Under federal law, "the three traditional requirements for the application of the doctrine of collateral estoppel are: (i) the issue to be precluded must be identical to that involved in the prior action, (ii) in the prior action the issue must have been actually litigated,

and (iii) the determination made of the issue in the prior action must have been necessary to the resulting judgment."

White v. World Finance of Meridian, Inc.,
653 F.2d 147, 151 (5th Cir. 1981).

An example will clarify the matter. In this case, Green alleges in his state court complaint that he entered into a written, fixed-term employment contract with Amerada Hess. This, despite the express finding of this court in Green I at 213 that Green "did not have a written contract of employment, but was hired for an indefinite period of time." The issue in both cases is identical. The issue was actually litigated and decided in Green I. The determination of the issue in Green I was necessary to the resulting judgment. Had Green been employed under a written fixed-term contract, he might have had a cause of action for wrongful discharge. But this

court specifically based its refusal to find a cause of action under Mississippi law on the fact that Green was a terminable at will employee. Id. at 214. Because all three necessary conditions are present here, Green is collaterally estopped from arguing before the federal court that he was employed under a fixed-term contract. Therefore, the court need not assume the allegation in Green's complaint to that effect is true under B., Inc.

[6] Having assumed that all other facts alleged by the plaintiff in his complaint are true, the court must then examine relevant state law and resolve all uncertainties in favor of the non-removing party. Id. at 550. Viewing the state law in its proper perspective, "if there is even a possibility that a state court would find a cause of action stated against any one of the named in-

state defendants on the facts alleged by the plaintiff, then the federal court must find that the in-state defendants have been properly joined, that there is incomplete diversity, and that the case must be remanded to the state courts."

Id. Stated conversely, there must be no possibility of a valid state cause of action being set forth against the in-state defendant before the court may hold that there has been a fraudulent joinder. Id., Keating v. Shell Oil Company, 610 F.2d 328, 331 (5th Cir. 1980); Tedder v. F.M.C. Corp., 590 F.2d 115, 117 (5th Cir. 1979); Suleski at 176-77; Parks at 478.

Stricklin argues that the standards enunciated in B., Inc. are "fundamentally wrong," and that the case establishes "bad law." This panel is not empowered to overrule the judgment of another panel of this court. B., Inc. is precisely on

point. It unequivocally directs the proper analysis in a fraudulent joinder case. In any event, as a policy matter, principles of limited federal jurisdiction, comity with the state courts, and freedom of the plaintiff "to prosecute his own suit in his own way to a final determination," Parks at 478, suggest a strict application of the judicially created doctrine of fraudulent joinder. Stricklin argues that the standards adapted in B., Inc. allow too much room for abuse by plaintiffs' attorneys. But in Mississippi, Miss. Code Ann. § 11-7-91, and in most jurisdictions, an attorney must sign the pleadings he files in an action. By his signature, the attorney vouches that there is good ground to support the pleading, and that it is not

interposed for delay or any other improper purpose. See Fed.R.Civ.P. 11.6/

With these general principles in mind, we now turn to the case at hand. Stricklin argues that Green could not possibly win in state court because his action is barred by res judicata. He points to our prior decision, Green I, as the operative judgment barring this litigation. It must be emphasized that we do not decide the merits of this claim. Our sole function is to determine

6/ Rule 11 provides in part that "the signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

whether there is a possibility that a Mississippi court would find that Green's cause of action against Stricklin is not barred by this court's prior judgment.

[7] In virtually all cases in which a federal court must decide the res judicata effect of a prior judgment of a federal court, it must apply federal res judicata principles.

Stovall v. Price Waterhouse Co., 652 F.2d 537, 540 (5th Cir. 1981). But that is not true where, as here, the court is evaluating the merits of a fraudulent joinder claim. In that situation, B., Inc. dictates that the court look to state law.

[8] In order for the doctrine of res judicata to apply under Mississippi law, four identities must exist. They are:

(1) identity of the thing sued for,

(2) identity of the cause of action,

(3) identity of the persons and parties to the action, and

(4) identity of the quality in the persons for and against whom the claim is made.

Pray v. Hewitt, 254 Miss. 20, 179 So.2d 842, 844 (Miss. 1965). See also Dunaway v. W. H. Hopper & Associates, Inc., 422 So.2d 749, 751 (Miss. 1982); Mississippi Employment Security Commission v. Georgia-Pacific Corporation, 394 So.2d 299, 301 (Miss. 1981); Cowan v. Gulf City Fisheries, Inc., 381 So.2d 158, 162 (Miss. 1980); Standard Oil Company v. Howell, 360 So.2d 1200, 1202 (Miss. 1978). Mississippi courts have strictly construed the requirement that there be an identity of parties. Stovall v. Price Waterhouse Co., 652 F.2d 537, 540 (5th Cir. 1981) ("Mississippi law in

this area has been characterized as being rigid as any now extant.").

The case of Magee v. Griffin, 345 So.2d 1027 (Miss. 1977) is very similar to the case at bar. GMAC sued Magee because he had missed monthly payments on his automobile. A valid judgment was entered against Magee and his car was repossessed. Magee then brought an action against GMAC and one of its employees, John Griffin. He claimed that GMAC and Griffin had embarrassed and humiliated him, and caused him to lose possession of his car. The trial court dismissed his action as barred by the prior judgment.

Although six of the nine justices on the Mississippi court voted to affirm as to GMAC, a different majority of six voted to reverse as to Griffin. In the opinion of those six justices, res judicata had no application against Griffin. Despite the fact that Griffin was acting

as an employee and agent of GMAC at all relevant times, the court held that there was no identity of the parties. Id. at 1033 (Patterson, J.).

The events giving rise to Ditta v. City of Clinton, 391 So.2d 627 (Miss. 1981) began when Ditta brought an action in Louisiana against Hammerhead Construction Company for breach of contract and defective construction of a retaining wall. The plans for the project had been modified and then approved by the City of Clinton. Hammerhead did its work under the direct and close supervision of Clinton personnel. Judgment was entered in favor of Hammerhead.

In a second suit, Ditta sued Hammerhead and Clinton. His claims against Clinton were based on Clinton's alleged wrongful acts and omissions as supervisor of the project. Despite the

close business relationship of Clinton and Hammerhead, and the fact that their duties vis-a-vis the project was substantially intertwined, the Mississippi Supreme Court held that there was no identity of the parties. As a result, res judicata was held not to apply. Id. at 629. Despite the close relationship of the defendant in the first action and the defendant in the second action in both Magee and Ditta, the Mississippi court held that res judicata did not apply.

The facts in the instant case are very similar. In Green I, Green only sued Amerada Hess. But in this case, Green named Stricklin as an additional defendant. We do not suggest that it would be impossible to distinguish Magee and Ditta from this case. However, B., Inc. teaches that we must resolve all uncertainties in the law in favor of

Green. Given these Mississippi precedents, there is a distinct possibility that a Mississippi court would hold that res judicata principles would not prevent Green from pursuing this action against Stricklin.

Stricklin next argues that Green could not possibly prevail in state court because Green is collaterally estopped from pursuing his claims as a result of our judgment in Green I. This argument could only succeed if Green is estopped from raising every issue presented in the complaint filed in this action. Collateral estoppel only bars relitigation of specific issues. Even if Green were collaterally estopped from pursuing all his claims save one in state court, a remand would be necessary.

[9] Collateral estoppel only applies when the issues were actually litigated in the prior action. Dunaway at 751;

State v. Smith, 278 So.2d 411, 415 (Miss. 1973); C.I.T. Corp. v. Turner, 248 Miss. 517, 157 So.2d 648, 660 (Miss. 1963). Several of the claims raised by Green in this case were not actually litigated in Green I. The issue actually litigated in Green I was whether Green was illegally discharged in retaliation for pursuing his workmen's compensation rights.^{7/} But in the present case, Green alleges that he was wrongfully subjected to "great anxiety, stress and mental anguish" by the defendants. He alleges that Stricklin maliciously refused to report Green's medical expenses to the insurance carrier. He alleges that Amerada Hess and Stricklin were dilatory in the payment of medical expenses. He alleges that several false accusations

^{7/} As previously noted, the court also found that Green was not employed under a written contract.

were made against him. These allegations were not actually litigated in Green I. There is a possibility that a Mississippi Court would hold that Green is not collaterally estopped from arguing these claims in a state court action.

[10] In any event, as with the law of res judicata, Mississippi appears to require a strict identity of parties before collateral estoppel applies.

Stovall at 540; McCarty v. Johns-
Mansville Sales Corp., 502 F.Supp. 335,
338 (S.D.Miss. 1980); Bush Construction
Company v. Walters, 254 Miss. 266, 179
So.2d 188, 190 (Miss. 1965); Johnson v.
Bagby, 252 Miss. 125, 171 So.2d 327, 330
(Miss. 1965). There is a possibility
that a Mississippi court would conclude
that the relationship between Amerada
Hess and Stricklin is insufficient to
estop Green.

It has been shown that Green might not be barred from bringing his state court action. We must now determine whether there is a possibility that Green has stated a valid cause of action under the substantive law involved. It bears repeating: we do not decide whether Green will actually, or even probably prevail on the merits of these claims. We look only for a mere possibility that he will do so. If even one of Green's many claims might be successful, a remand to state court is necessary. Cf. B., Inc. at 650 (if valid cause of action is stated against even one of the four named in-state defendants, remand is called for).

Green alleges that the "unprivileged, wilful, wanton, malicious and gross" acts of Stricklin were intended to, and did cause Green severe mental pain and stress. In numerous cases, the Mississippi Supreme

Court has recognized that damages for mental suffering are recoverable when they are the "proximate result of an act committed maliciously, intentionally, or with such gross carelessness or recklessness as to show an utter indifference to the consequences when they may have been in the actor's mind," Lyons v. Zale Jewelry Company, 246 Miss. 139, 150 So.2d 154, 158 (1963), or "[w]here there is something about the defendant's conduct which evokes outrage or revulsion," Sears, Roebuck & Co. v. Devers, 405 So.2d 898, 901 (Miss. 1981), or when they result from a "wanton or shamefully gross wrong," Saenger Theaters Corp. v. Herndon, 180 Miss. 791, 178 So. 86, 87 (1938).^{8/}

^{8/} See McCulloch v. Glasgow, 620 F.2d 47, 51 (5th Cir. 1980) (applying Mississippi law) (no physical impact required); Burris v. South Central Bell Telephone (footnote continued on next page)

The wrongful acts that Green alleges Stricklin intentionally committed, and that we must assume, for the purposes of this motion, Stricklin did commit, are that he: (1) "maliciously refused to report to the [insurance] carrier the medical expenses incurred in the treatment of Green's work-related injury"; (2) was dilatory in the payment of Green's medical expenses; (3) "harassed, humiliated and embarrassed Green";

(footnote 8 continued)

Co., 540 F.Supp. 905, 909 (S.D.Miss. 1982) (applying Mississippi law); Johnson v. Ford Motor Co., 354 F.Supp. 645, 648 (N.D.Miss. 1973) (applying Mississippi law) (willful, wanton, intentional or malicious wrong); Sears, Roebuck & Co. v. Young, 384 So.2d 69, 71 (Miss. 1980) (same); First National Bank v. Langley, 314 So.2d 324, 338 (Miss. 1975) (willful or wanton acts); T. G. Blackwell Chevrolet Co. v. Eshee, 261 So.2d 481, 485 (Miss. 1972) (intentional or willful wrong); Daniels v. Adkins Protective Service, Inc., 247 So.2d 710, 711 (Miss. 1971).

(4) "employed the use of injurious falsehood",^{9/} (5) "deprived Green of his lawful employment, denied him the right to pursue his trade, and destroyed Green's economic advantage", and (6) discharged Green in an abusive and outrageous manner. Whether these acts are sufficiently "wrongful", "wanton", "shamefully gross", or sufficient to evoke "outrage and revulsion" under Mississippi law is unclear. For example, although Green I established that Amerada Hess was entitled to discharge Green, it did not hold that Stricklin was entitled to carry out the dismissal in an "abusive and outrageous

^{9/} The alleged falsehoods were that "Green was unable to get along with his fellow employees; that he did not perform his job in a workmanlike manner, that he left oil tanks run over, and that he had let dirty oil run through the lines, costing the company great and needless expense."

manner." With respect to the falsehoods allegedly uttered, and the harassment and humiliation, the Mississippi courts have held that, in some circumstances, abuse that is purely verbal may constitute a sufficiently wanton act to justify the imposition of liability for the mental anguish caused. Lyons, 150 So.2d at 155, 162 (abusive remarks over the telephone); Saenger Theatres Corporation, 178 So. at 87 (accusations hurled on public street); Continental Casualty Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935) (defendant went to sick man's home and called him a liar). Thus, there is a possibility that a Mississippi court would conclude that Green has set forth a valid cause of action for mental suffering resulting from Stricklin's wrongful acts.

Having assumed all the facts set forth by Green to be true, and having

resolved all uncertainties as to state substantive law against Stricklin, we conclude that there is a possibility of a valid cause of action being set forth against Stricklin in state court. Therefore, Stricklin was not fraudulently joined. There was incomplete diversity, and the district court was required to remand to the Mississippi court. Its failure to do so constituted reversible error. We reverse and remand with instructions to remand the cause to state court.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

DAVID R. GREEN

VS. CIVIL ACTION NO. E80-0121(R)

AMERADA HESS CORPORATION
and L. A. STRICKLIN

OPINION

Plaintiff, David R. Green,
originally instituted this action against
Defendants, Amerada Hess Corporation and
L. A. Stricklin, in the Circuit Court of
Clarke County, Mississippi alleging a
breach of an employment contract and
intentional infliction of emotional
distress.^{1/} Amerada Hess removed the

^{1/} This action is one of four lawsuits
filed against Amerada Hess since
1975 by David R. Green concerning
his discharge from employment at
Amerada Hess.

action to Federal Court contending diversity of citizenship existed since L. A. Stricklin, previously Hess' vice-president of U.S. Production in Tulsa, Oklahoma and now a resident of Mississippi, was fraudulently joined in order to defeat federal jurisdiction.^{2/} Subsequently, Plaintiff moved this Court to

^{2/} Plaintiff asserts that the removal petition should be denied and the case remanded because the removal petition was filed by only one Defendant, Amerada Hess. Plaintiff stated the general rule that all Defendants must join in the removal petition. 1A Moore's Federal Practice §0.168 (3.-2), at 447 (1979). However, he overlooked the well-recognized exception to this rule that "formal", "normal" or "improper" Defendants need not join the petition. See e.g., Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen, et al, 427 F.2d 325, 326 (5th Cir. 1970); McCurtain County Production Corp. v. Cowett, 482 F. Supp. 809, 813 (E.D. Okla. 1978); McKinney v. Rodney C. Hunt Co., 464 F. Supp. 59, 62 (W.D.N.C. 1978); Williams v. Atlantic Coast Line Railroad Company, 294 F. Supp. 815, 816 (S.D. Ga. 1968); 1A Moore's Federal Practice §0.168 (3.-2) at 448 (1979); 14 Wright, Muller & Cooper, Federal Practice and Procedure, §3731, at 719-20 (1976).

remand the action to the Clarke County Circuit Court. After a full evidentiary hearing on March 30, 1981 and on May 22, 1981 and considerable briefing of the issue, this Court concludes that the Plaintiff's motion to remand should be denied on the basis of fraudulent joinder of the resident Defendant, L. A. Stricklin. Accordingly, this Court will retain jurisdiction of this cause and promptly dismiss Defendant, L.A. Stricklin, from further proceedings pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

In order to assess the propriety of the joinder of Defendant, L. A. Stricklin, this Court properly "pierced the pleadings" to determine "whether under any set of facts alleged in the petition, a claim against the Defendant(s) could be asserted" which controls the substantive issues and which will ultimately determine

whether a cause of action exists.

Keating v. Shell Chemical Co., 610 F.2d 328, 331 (5th Cir. 1980) per curiam; Tedder v. F. M. C. Corp., 590 F.2d 115, 116 (5th Cir. 1979) per curiam; Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen, et al, 427 F.2d 325, 327 (5th Cir. 1970); Parks v. New York Times, Co., 308 F.2d 474, 478 (5th Cir. 1962); Williams v. Tri-County Community Center, 323 F. Supp. 286, 288 (S.D. Miss.) aff'd, 452 F. 2d 221 (5th Cir. 1971); Howard v. General Motors Corp., 287 F. Supp. 646, 647-48 (N.D. Miss. 1968). Indeed, the Fifth Circuit has succinctly stated that, upon a motion to remand, the district court has a "duty to hear and determine the factual issues once affidavits have been submitted contradicting the removal petition." Smith v. City of Jackson, 358 F. 2d 705, 705 (5th Circuit 1966) (per curiam).

Then, the trial court must determine "(i)f there is any possibility that the facts Plaintiff alleges could support a claim, making dismissal under Rule 12(b)(6) improper." However, "when lack of a state law claim is apparent, dismissal at this point in the proceedings does not constitute a premature trial on the merits." Keating, supra at 332. See also, Tedder, supra at 117; Bobby Jones Garden Apartments, Inc. v. Suleski, 391 F. 2d 172, 176 (5th Cir. 1968); Parks, supra at 478; Dees, supra at 618; Howard, supra at 648. The district court's power to retain jurisdiction over the action is limited to cases where it finds that there has been bad faith in the joinder, regardless of Plaintiff's motive. Howard, supra. Bad faith in joining a Defendant may be shown "by proving that the Plaintiff stated the facts knowing them to be

false, or with enough information within reach so that he should have known them to be false." Id. This Court concludes that Plaintiff, David R. Green, and his attorneys had sufficient facts within their reach to know or ascertain that no cause of action in fact existed under Mississippi law against Defendant, L. A. Stricklin, so that he would be liable for the termination of Plaintiff and the alleged intentional infliction of emotional distress.

Plaintiff has sought to convince this Court that L. A. Stricklin, as Hess' vice-president of United States Production in Tulsa, Oklahoma, personally participated in or was responsible for alleged wrongful termination of Plaintiff from employment at Amerada Hess. As clearly stated in Childers v. Beaver Dam Plantation, Inc., 350

F. Supp. 331, 335 (N.D. Miss. 1973), the law of Mississippi is that

(i)t is universally held in Mississippi and elsewhere, that the officers, directors, stockholders or employees of a corporation cannot be held responsible for the torts of the corporation unless such officer, director, stockholder, or employee personally participated in the commission of the tort, or aided and abetted the commission thereof. (emphasis added).

See also, Grapico Bottling Co. v. Ennis, 140 Miss. 502, 106 So. 97 (1925). The evidence submitted to this Court convincingly proves that L. A. Stricklin did not personally participate in the decision to terminate Plaintiff or in his actual termination. The proof shows that Stricklin was only informed of the decision to terminate Plaintiff for cause, which decision was made by management personnel authorized to take such action.

Stricklin's testimony revealed that as vice-president of Production for Amerada Hess, his major responsibilities included handling administrative matters, budgeting, production planning and drilling services (TR. Vol. I at 48). He had no involvement with the daily operations of his department, including the hiring and discharging of approximately 750 hourly employees such as Plaintiff. (TR. Vol. I at 48; Vol. II at 56). The manager of Production, George Dewhurst, and his management subordinates handled employment-related matters. (TR. Vol. I at 46-8; Vol. II at 56). Stricklin did admit that he had been informed of the decision to terminate Green as a matter of protocol. (TR. Vol. I at 38, 43). However, he emphatically denied exercising any authority to initiate or to approve Green's termination. Stricklin's

testimony regarding his lack of any involvement with Green's termination is substantially corroborated by numerous employees of Amerada Hess who claim responsibility for the decision to terminate Green and for the actual termination thereof. Specifically, the sworn affidavit of David M. Pritchard, previously an employee of Hess', stated that he initiated the decision to terminate Green because of poor work performance and actually carried out that decision. (Ex. D-4). Pritchard further states that he didn't seek Stricklin's approval for his decision nor was it even discussed with Stricklin. The affidavit of Donald L. Miller, Plaintiff's immediate supervisor, substantiates Pritchard's statements. (Ex. D-1). Miller confirmed the fact that Pritchard made the decision to discharge Plaintiff without the approval

or participation of L. A. Stricklin. Moreover, the affidavit of James C. Hefley, Regional Manager of the Southeast Region of Amerada Hess, states that the decision to discharge Plaintiff had already been made and was being processed before Stricklin was informed of the decision. (Ex. D-3). According to the affidavit of W. C. Henderson, Southeast Region Operations Manager in 1975, he, as Pritchard's supervisor, approved Pritchard's decision to terminate Plaintiff.

Plaintiff unconvincingly attempts to combat the veracity of these sworn affidavits by summarily disposing of them as "unworthy of consideration" and sheer "doubletalk." (Plaintiff's brief at 6). In support of his contention that Stricklin was personally involved in the termination, Plaintiff introduced the unsigned transcript of a telephone

conversation between Plaintiff's attorneys and Donald Miller wherein Miller very equivocally stated that Stricklin had made the decision to terminate Green.

In view of the strong evidence presented by Defendants and the somewhat transparent support mustered by Plaintiff, this Court concludes that "there is no arguably reasonable basis for predicating that the alleged Mississippi law might impose liability on the resident Defendant under the facts alleged." Keating, supra at 331; Tedder, supra at 117; Bobby Jones Garden Apartments, Inc., supra at 176; Parks, supra at 478; Dees, supra at 618; Howard, supra at 648.

IT IS THEREFORE the opinion of this Court that Defendant, L. A. Stricklin, was fraudulently joined by Plaintiff to defeat diversity jurisdiction and since this Court finds a plethora of facts

which could have been ascertained by Plaintiff to verify Stricklin's lack of personal involvement, this Court retains jurisdiction of this cause and finds that Defendant, L. A. Stricklin, should be dismissed from further proceedings in this matter.

An Order will be submitted in accordance with the foregoing opinion within the time prescribed by the local rules.

UNITED STATES DISTRICT JUDGE

DATED: July 21, 1981

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

DAVID R. GREEN

PLAINTIFF

VS.

CIVIL ACTION NO. E80-0121(R)

AMERADA HESS CORPORATION
AND L. A. STRICKLIN

DEFENDANTS

O R D E R

THIS CAUSE having come on for
hearing on the Plaintiff's Motion to
Remand, and a full evidentiary hearing
having been had on said Motion on March
30, 1981, and on May 22, 1981, and this
Court having carefully considered all
the evidence finds that resident
Defendant, L. A. Stricklin, has been
fraudulently joined in this action and

that Plaintiff's Motion to Remand should be denied.

THEREFORE, IT IS ORDERED that Plaintiff's Motion to Remand is denied on the basis of fraudulent joinder of the resident Defendant, L. A. Stricklin. It is further ordered that this Court hereby retains jurisdiction of this cause and that Defendant, L. A. Stricklin, is dismissed from all further proceedings in this cause pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure.

SO ORDERED this the 13th day of October, 1981.

U. S. DISTRICT JUDGE

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION**

DAVID R. GREEN

PLAINTIFF

VS.

CIVIL ACTION NO. E80-0121(R)

AMERADA HESS CORPORATION

DEFENDANT

MEMORANDUM OPINION

Defendant, Amerada Hess Corporation, has moved this Court to enter, pursuant to F.R.Civ.P. Rule 56, summary judgment in its favor and against Plaintiff, David R. Green, on the basis that this action is barred under the doctrine of res judicata and/or collateral estoppel by the Judgment and Findings of Fact and Conclusions of Law entered in David R. Green v. Amerada Hess Corp., Civil Action No. E78-0065(C) (July 19, 1979),

aff'd, 612 F.2d 212 (5th Cir.), reh. en banc denied, 614 F.2d 1298 (5th Cir.), cert. denied, 449 U.S. 952 (1980).

FINDINGS OF FACT

Plaintiff, David R. Green, filed the instant action against Amerada Hess Corporation and L. A. Stricklin in November 1980¹/ in the Circuit Court of Clarke County, Mississippi seeking damages for an alleged breach of contract by these defendants; for an alleged tortious conspiracy by these defendants to deprive plaintiff of his statutory and constitutional rights; for an alleged interference with his economic advantage; and for alleged intentional infliction of emotional distress. The action was subsequently removed to this Court by Defendant on the basis of diversity jurisdiction and the fraudulent joinder of L. A. Stricklin. Stricklin

was dismissed from this lawsuit following an Order by this Court on October 13, 1981 that Defendant Stricklin was fraudulently joined by Plaintiff to defeat Federal diversity jurisdiction.

The facts upon which Plaintiff relies in support of his allegations are as follows: Plaintiff began his employment with Amerada Hess Corporation in January 1972 as a lease operator. In April 1973, Plaintiff sustained a work-related injury. He immediately filed an accident report although he continued working until April 1974 when he was hospitalized for a week of diagnostic tests. Thereafter, he returned to work until October 1974 when he was again hospitalized for back surgery. After recuperating, he resumed his employment in December 1974. In July 1975, Green was dismissed. He alleges that his

discharge was the result of a conspiracy on the part of Hess' employees to coerce him to abandon his employment because of his stated intention to invoke his statutory rights under the Mississippi Workmen's Compensation Act, MISS. CODE ANN. § 71-3-1, et seq.2/ These conspirators allegedly utilized injurious falsehood to carry out their deed. As a result of their conspiracy, Plaintiff was wrongfully discharged and, thus deprived of his lawful employment, his right to pursue a trade and his economic advantage.

According to Green, Hess breached its "written, fixed term contract of employment" with him by wrongfully discharging him for pursuing his worker's compensation rights. He states that the parties agreed and contracted to continue his employment until normal retirement, or, thirty-four (34) years.

Green contends that his acceptance of Hess' "Benefit Program for Employees", which includes the Employees Pension Plan; Savings and Stock Bonus Plan; Medical Expense Benefits; Personnel Policies; and Survivor Benefits, upon commencement of his employment, constitutes a written, fixed term contract with Hess.

Defendant-Hess retorts Plaintiff's contentions by referring to the Judgment and Findings of Fact and Conclusions of Law in Green v. Amerada Hess Corp., E78-0065(C) and the affirmance by the Fifth Circuit, 612 F.2d 212 (5th Cir. 1980), wherein the terms and conditions of Plaintiff's employment with Hess were adjudicated. Defendant contends that the instant action is barred by the final adjudication in the prior suit under the doctrine of res judicata and/or collateral estoppel.

CONCLUSIONS OF LAW

The doctrine of res judicata provides that

"a prior valid judgment operates as an absolute bar to a second suit between the same parties or their privies based on the same cause of action not only in respect of every matter actually litigated, but also as to every ground of recovery or defendant which might have been raised."

Key v. Wise, 629 F.2d 1049, 1063 (5th Cir. 1980); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 648 (N.D. Cal. 1978) (quoting Mirin v. Nevada ex rel., Public Service Commission, 547 F.2d 91, 94 (9th Cir. 1976), cert. denied, 432 U.S. 906 (1977)).

The Fifth Circuit in Stevenson v. International Paper Co., 516 F.2d 103, 109 (5th Cir. 1975), delineated the requirements which must be met before res judicata applies:

(1) the prior judgment must be rendered by a court of competent jurisdiction;

(2) the parties, or those with privity, must be identical in both suits;

(3) the same cause of action must be involved in both suits; and,

(4) there must have been a final judgment on the merits.

See also, Bradford v. Bronner, Slip op. at 14162 (5th Cir. Jan. 11, 1982); Key v. Wise, supra at 1061.

The principle difficulty, as stated by the court, is determining whether the cause of action in the first suit is identical to that in the second suit.

"A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result...is the violation of but one right by a single legal wrong."

516 F.2d at 109 (quoting Seaboard Coast Line R. R. Co. v. Gulf Oil Corp., 409 F.2d 879, 881 (5th Cir. 1969)).

Therefore, the test for comparing causes of action is "whether or not the primary right and duty and delict or wrong are the same in each action." Id.

Collateral estoppel operates as a bar in a second action between the same parties upon a different cause of action only as to those matters in issue or points in controversy which were actually litigated and determined in the first proceeding. Stevenson v. International Paper Co., supra at 109. The requirements which must be met before application of collateral estoppel are:

(1) the issue to be concluded must be identical to that involved in the prior action;

(2) in the prior action, the issue must have been "actually litigated"; and,

(3) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. Id. at 110.

For the reasons hereinafter stated, it is the opinion of this Court that the instant action is barred under the doctrines of res judicata and collateral estoppel by the decisions of the district court and the Fifth Circuit in Green v. Amerada Hess Corp., E78-0065(C) (July 19, 1979), aff'd, 612 F.2d 212 (5th Cir.), reh. en banc denied, 614 F.2d 1299 (5th Cir.), cert. denied, 449 U.S. 952 ("Green I").

In Green I, David R. Green filed suit against Amerada Hess Corporation claiming that he was wrongfully discharged from his job for pursuing his rights

under Mississippi Workmen's Compensation statute. Plaintiff contended that he was dismissed by Defendant so that it might avoid payment of compensation benefits to Plaintiff for his work-related injury. See, Complaint in Green v. Amerada Hess Corp., E80-0121(R); Findings of Facts and Conclusions of Law in Green v. Amerada Hess Corp., E78-0065(C); Green v. Amerada Hess Corp., 612 F.2d 212, 213 (5th Cir. 1980). The facts supporting Plaintiff's complaint in Green I are essentially the same as those stated herein.

The district court in Green I granted Defendant's Motion for Summary Judgment on the ground that Green's claim did not state a valid cause of action under Mississippi law. See Findings of Facts and Conclusions of Law in Green I; Green v. Amerada Hess Corp., 612 F.2d at 213. Both the district

court and the Fifth Circuit found that Green did not have a written contract of employment, but was hired for an indefinite period of time. Therefore, under Mississippi law, the court ruled that Hess could at anytime legally discharge its employees hired for an indefinite period of time without any justification. Moreover, the Fifth Circuit found that the terminable at will rule in Mississippi was "directly relevant" to the resolution of whether Green's claim for retaliatory discharge for pursuing compensation benefits stated a cause of action in Mississippi. 612 F.2d at 214.³/ The court concluded that no such cause of action existed under Mississippi law. Id.

After examination of the complaints filed in Green v. Amerada Hess Corp., E78-0065(c) and E80-0121(R); the Findings of Facts and Conclusions of Law

entered in Green v. Amerada Hess Corp., E78-0065(R); and the opinion of the Fifth Circuit in Green v. Amerada Hess Corp., 612 F.2d 212 (5th Cir. 1980), it is the conclusion of this Court that:

(1) the prior judgment in Green I was rendered by a court of competent jurisdiction;

(2) the parties in both suits are identical;

(3) the same cause of action is involved in both suits;

(4) there was a Final Judgment on the merits.

Therefore, the doctrine of res judicata operates to bar relitigation of Plaintiff's claim of wrongful discharge in a second suit. Since we have concluded that Plaintiff claims violation of the same right in both suits, i.e., wrongful discharge for pursuing his compensation benefits, and since a final judgment was

entered in Green I determining that Plaintiff's employment was terminable at will thereby rendering his cause of action invalid, then the present claims of tortious conspiracy, deprivation of statutory and constitutional rights, interference with economic advantage and intentional infliction of emotional distress do not alter the substance of Plaintiff's cause of action. Res judicata bars litigation in a second lawsuit on the same cause of action "all grounds for, or defenses to, recovery that were available to the parties [in the first action], regardless of whether they were asserted or determined in a prior proceeding." Key v. Wise, 629 F.2d at 1063. Green I determined that Plaintiff did not have a written, fixed term contract and, therefore, was terminable at the will of his employer without jurisdiction. Further, he has no cause

of action under Mississippi law for retaliatory discharge for pursuing his worker's compensation benefits. Therefore, this Court is precluded from determining the conditions of Plaintiff's employment with Defendant and whether his complaint states a cause of action for retaliatory discharge.

Therefore, it is the opinion of this Court that Defendant's Motion for Summary Judgment is well-taken and hereby granted.

An Order in accordance with this Opinion shall be submitted by the parties within the time provided by the Local Rules. This the 12th day of May, 1982.

UNITED STATES DISTRICT JUDGE

- 1/ The instant action was filed eighteen days following denial of certiorari by the United States Supreme Court in Green v. Amerada Hess Corp., 612 F.2d 212 (5th Cir. 1980).
- 2/ The Fifth Circuit in Green v. Amerada Hess Corp., 612 F.2d 212 (5th Cir. 1980) declined to address the question of whether Green was discharged for pursuing his worker's compensation rights since the district court did not state that retaliation was not involved, but that the allegations did not state a proper cause of action. 612 F.2d at 214 n.1.
- 3/ See also, White v. Mississippi Oil & Gas Board, 650 F.2d 540, 543 (5th Cir. 1981) (an agreement for "permanent" employment in Mississippi is terminable at the will of either party).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-4223

D.C. Docket No. CA-E-80-0121(R)

DAVID R. GREEN,

Plaintiff-Appellant,

versus

AMERADA HESS CORPORATION
AND L. A. STRICKLIN,

Defendants-Appellees.

Appeal from the United States
District Court for the
Southern District of Mississippi

Before CLARK, Chief Judge, THORNBERRY
and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on
the record on appeal and was argued by
counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that the defendants-appellees pay to the plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

June 16, 1983

ISSUED AS MANDATE:

APPENDIX F

**IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

No. 82-4223

DAVID R. GREEN,

Plaintiff-Appellant,

versus

**AMERADA HESS CORPORATION,
and L. A. STRICKLIN,**

Defendants-Appellees.

**Appeal from the United States
District Court for the Southern
District of Mississippi**

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

**(Opinion June 16, 1983, 5 Cir.,
1983, ____ F.2d ____)**

(August 10, 1983)

**Before CLARK, Chief Judge, THORNBERRY
and RANDALL, Circuit Judges.**

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

() The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having noted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having noted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX G

AFFIDAVIT

STATE OF OKLAHOMA)
) ss
COUNTY OF TULSA)

I, James C. Hefley, Jr., am presently employed by Amerada Hess Corporation as Unitization Manager in the Amerada Hess office in Tulsa, Oklahoma. I am 50 years of age and reside at 3722 East 80th Street in Tulsa. The information contained in this Affidavit is based upon my own personal knowledge.

From April, 1975 to September, 1976, I was employed by Amerada Hess as Regional Manager of the Southeastern Region, which was composed of Mississippi and Louisiana. In this position, I had general responsibility for the overall production operations of the region.

Regarding the discharge of David Green, I was informed by my Operations Manager, W. C. Henderson, that David Pritchard, the Eucutta Area Superintendent at that time, had decided to discharge Green. Henderson previously told me the reasons for the discharge - allowing an oil spill from a tank battery to occur; signing a LACT unit ticket without witnessing the oil transfer and the recording of the quantity and quality of the oil on the ticket by the purchaser's gauger in direct violation of written company policy; and other problems with his supervisor and other field employees. I agreed with Pritchard's decision since those kinds of activities could not be tolerated within the operation.

That same day I contacted the personnel department in the Amerada Hess Tulsa office to get Green's final payroll

check processed and to make other arrangements necessary for severance of pay. I also tried to call George Dewhurst in the Tulsa office to inform him of Pritchard's decision. Dewhurst was my immediate supervisor as Manager of U.S. Production and, since discharge of an employee was a serious matter, I wanted to inform him of Green's discharge as a matter of information and courtesy. Dewhurst was out of town so I contacted L. A. Scricklin, the Vice President of Production and Dewhurst's supervisor, to briefly let him know that Pritchard was going to discharge Green and that the final payroll check was being processed. The conversation was brief, maybe one or two minutes. I didn't even explain the details that necessitated the discharge. The call was simply informational as a matter of courtesy to let one of my supervisors

know that the discharge was proceeding, since discharge of an employee was a serious matter that happened infrequently. Stricklin was not involved at all in the decision to discharge Green nor was he involved in making the arrangements to obtain Green's severance pay and final payroll check. Stricklin had no knowledge of Green's discharge prior to my informing him of Pritchard's decision and this conversation was the only one I had with Stricklin about the matter.

The above and foregoing statements, as set forth in this Affidavit, are true and correct as herein stated to the best of my knowledge.

James C. Hefley, Jr.

SWORN to and subscribed before me
this 25th day of February, 1981.

Notary Public

My Commission Expires: April 23, 1982

APPENDIX H

AFFIDAVIT

STATE OF LOUISIANA,

PARISH OF CADDO.

My name is David Michael Pritchard. I am thirty-two years of age and reside at 724 Coachlight, Shreveport, Louisiana. I am self-employed as President of Pritchard Engineering and Operating Company. The information contained in this Affidavit is based upon my own personal knowledge.

From April or May of 1975 to December of 1975, I was employed by Amerada Hess Corporation as Eucutta Area Superintendent, with headquarters in Laurel, Mississippi. I was generally responsible for supervising the daily functions of the area operations, from maintenance to the production of the oil

and sales, and for supervising all the employees who were part of the operation.

I initiated and made the decision to terminate the employment of David Green for cause in late July, 1975. Generally, there were three reasons for my decision to terminate Green's employment. First, Green, who was a lease operator in the Quitman Field, allowed an oil spillover to occur from a rejection tank in the Lambert Tank battery on his beat. The spillover, which occurred shortly before the actual termination of Green's employment, required extensive clean-up and was simply inexcusable neglect of duty by Green.

Secondly, Green signed a LACT run ticket, which records the quantity and purity of oil sold to the oil purchaser, without witnessing the transfer of oil from the storage tanks or the recording of the quantity and purity of the oil by

the oil purchaser's gauger. The run ticket is probably the most important thing which happens in the oil field because it records the fact that the oil has been sold and it's what the company gets paid on. Therefore, it's essential that the run ticket be correct. About ten thousand barrels of oil were sold on the basis of a run ticket which was signed by Green in advance of the transfer of oil without witnessing the transfer of oil or the recording of the quantity and purity of the oil on the run ticket. This run ticket recorded a very high impurity content of about 15 percent. The maximum permissible impurity level for merchantable oil was about 1 1/2 percent. Because of the recorded high impurity content, Amerada Hess was not paid for about 15 percent of the oil, costing the company almost \$9,000. Whatever the reason for the

high impurity level recorded on the run ticket, it was Green's responsibility to make sure that the oil that is sold was of merchantable quality and to witness the transier of the oil and the recording of the quantity and quality of the oil on the run ticket by the purchaser's gauger. His failure to do this was an inexcusable violation of written company policy.

Thirdly, my field and Green's immediate supervisor, Don Miller, constantly reported to me over the course of several months that Green had a bad attitude about his job, that he had had personality conflicts with Miller and other employees, and that Miller had problems getting the cooperation from Green which he needed to run the lease operation effectively.

After I made the decision that Green should be terminated, I contacted by

telephone W. C. Henderson, the Southeast Operations Manager, and my immediate superior in Lafayette, Louisiana, to inform him of my decision and the reasons behind it and to recommend that he approve my decision to terminate Green. Henderson agreed with my decision and approved it.

About a day or two later, I called Green into the Eucutta equipment field office. The only other person present was Don Miller. I simply told David that he was terminated effective that day and that Amerada Hess wasn't in need of his services any longer. I gave him two reasons for the termination, the signing of the bad run ticket without witnessing the transfer of oil and the recording the oil quality and quantity on the run ticket, and the Lambert tank battery oil spillover.

L. A. Stricklin, who was Vice President of Production in the Amerada Hess, Tulsa, Oklahoma, office at the time, did not participate at all in the decision to terminate Green's employment, nor did he have anything to do with the actual termination meeting with Green. I made the decision to terminate Green and my decision was approved by my superior, W. C. Henderson. I alone informed Green that his employment was terminated, in the presence of Don Miller. I did not seek approval for the termination from Stricklin nor did I even discuss with him, within the context of the termination of Green, the problems which Green had caused and was causing.

The above and foregoing statements, as set forth in this Addidavit, are true and correct as herein stated to the best of my knowledge.

David M. Pritchard

SWORN TO AND SUBSCRIBED before me
this 25th day of February, 1981.

NOTARY PUBLIC in and for
CADD0 Parish, Louisiana.

My Commission Is for Life.

APPENDIX I

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF LAFAYETTE

I, WILLIAM C. HENDERSON, am 68 years of age and my home address is 332 Rena Drive in Lafayette, Louisiana. I am a part-time consultant to a company in Houma, Louisiana named Oil Well Completion Specialists. The information contained in this Affidavit is based upon my own personal knowledge.

From 1973 to 1977, I was employed by Amerada Hess Corporation as Operations Manager for the Southeast Region, which was Louisiana and Mississippi. It was my job to supervise the production operations for this region.

On about July 22, or 23, 1975, David Pritchard, who was at that time the Eucutta Area Superintendent in southeast

Mississippi, called me to say that he had decided to fire David Green, a lease operator in the Quitman Field, and wanted to know if I agreed with his decision. He explained to me the reasons for the firing. One reason was that Green had been negligent in letting a tank battery in the Quitman Field spill over, costing about \$3,000 to clean up. Also he informed me that Green had signed a run ticket without witnessing the oil transfer and the run ticket had an impurity content on it that was way out of line, costing the company several thousand dollars. Also, Pritchard told me that Green wasn't getting along with his supervisor and some other employees in the field. I agreed with Pritchard's decision to fire Green and approved it.

That same day I called Jim Hefley, who was my immediate superior in the

Lafayette, Louisiana office. Hefley was Regional Manager for the Southeast Region. I told him that Pritchard had decided to fire Green and that I agreed and approved his decision. I told Hefley the reasons for the firing and Hefley agreed that Green should be discharged. I asked Hefley to proceed with getting Green's final payroll check, current up to the date of discharge, from the company payroll department in Tulsa, Oklahoma, since it was company policy to present an employee with his final pay at the time that he is fired.

L. A. Stricklin, who was Vice President of Production out of the Tulsa office at that time, had nothing to do with the firing of David Green. I never even discussed Green's firing with Stricklin. The decision to fire came from David Pritchard and I agreed with and approved his decision. That was

really the extent of it. I did inform my superior, Hefley, basically as a matter of courtesy and so that he could get Green's payroll check processed, that Pritchard was going to let Green go. Stricklin just had no actual involvement at all in Pritchard's decision to fire Green.

The above and foregoing statements, as set forth in this Affidavit, are true and correct as herein stated to the best of my knowledge.

W. C. HENDERSON

SWORN to and subscribed before me
this the 25th day of February, 1981.

Notary Public

My Commission Expires: Upon my death

APPENDIX J

AFFIDAVIT

THE STATE OF TEXAS

COUNTY OF MIDLAND

My name is Donald L. Miller. I am 47 years of age and reside at 3510 Hyde Park, Midland, Texas. I am employed by C & K Petroleum, Inc. in Midland, Texas, as Assistant Field Superintendent of drilling and production. The information contained in this Affidavit is based upon my own personal knowledge.

From February of 1975 to February of 1976 I was employed by Amerada Hess Corporation as Field Maintenance Supervisor in the Eucutta Area in Southeast Mississippi. In that position I was responsible for the operations of equipment in the Quitman Oil Field in Clark and Wayne Counties. From April of

1975 to December of 1975, my immediate superior was David Pritchard, who was Eucutta Area Superintendent. As Field Equipment Supervisor I was David Green's immediate superior.

The decision to terminate the employment of David Green was made by David Pritchard. Pritchard discharged Green for cause in late July of 1975 at the Eucutta Equipment Field Office. Other than Green and Pritchard, I was the only other person present when Pritchard fired Green. I remember that Pritchard told Green that one of the reasons he was being fired was that Green had signed a LACT run ticket without actually seeing the oil being taken from the storage tanks or seeing the gauger record the amount and BS&W content of the oil.

To the best of my knowledge, L. A. Stricklin, who was with the Amerada Hess

office in Tulsa, Oklahoma, at that time, had nothing to do with the decision to fire David Green, and he was not present at the time that Pritchard fired Green in July of 1975. I didn't have any contact at all with Stricklin about Green before or after Green was fired.

The above and foregoing statements, as set forth in this Affidavit, are true and correct as herein stated to the best of my knowledge.

DONALD L. MILLER

SWORN TO AND SUBSCRIBED BEFORE ME
this the 25th day of March, 1981.

(Tom Sealy)
Notary Public, State of Texas

My Commission Expires: March 31, 1985

CERTIFICATE OF SERVICE

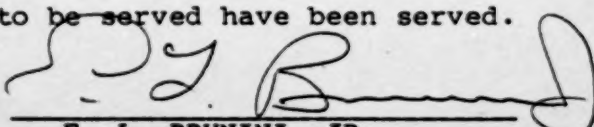
I, E. L. BRUNINI, JR., Counsel of Record for Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 22nd day of September, 1983, I served copies of the foregoing Appendices to Petition For A Writ of Certiorari on the parties by mailing three copies of said document by first class United States mail, in duly addressed envelopes, with postage pre-paid, to each of the following persons:

Dixon L. Pyles, Esquire
Pyles & Tucker
507 East Pearl Street
Jackson, Mississippi 39201

James M. Brown, Esquire
Post Office Box 393
Laurel, Mississippi 39440

Clyde Brown, Esquire
410 S. Burke Avenue
Long Beach, Mississippi 39560

I further certify that all parties required to be served have been served.



E. L. BRUNINI, JR.